

USDOL/OALJ Reporter

[Kang v. Dept. of Veterans Affairs Medical Center](#), 92-ERA-31 (Sec'y Feb. 14, 1994)

Go to: [Law Library Directory](#) | [Whistleblower Collection Directory](#) | [Search Form](#) |  
[Citation Guidelines](#)

---

DATE: February 14, 1994  
CASE NO. 92-ERA-31

IN THE MATTER OF

SIMKEON KANG, M.D.,

COMPLAINANT,

v.

DEPARTMENT OF VETERANS  
AFFAIRS MEDICAL CENTER,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

Before me for review is the Recommended Decision and Order (R.D. and O.) of the Administrative Law Judge (ALJ) issued on March 31, 1993, in this case arising under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988). After a hearing, the ALJ recommended dismissal of the complaint as untimely pursuant to the applicable regulations at 29 C.F.R. § 24.3(b) (1992).

Upon careful review of the ALJ's R.D. and O., the evidence of record and the submissions of the parties before me, I agree with the ALJ's recommendation to dismiss the complaint as untimely. The ALJ's factual findings are supported by the record with the exceptions noted herein. [1] The ALJ's analysis of the timeliness issue is in accordance with the pertinent case law and the Secretary's prior decisions on timeliness and equitable tolling. See *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988); *Howard v. Tennessee Valley Authority*, Case No. 90-ERA-24, Sec. Final Dec. and Order of Dismissal, July 3, 1991, slip op. at 2-3, *aff'd sub nom. Howard v. U.S. Department of Labor*, 959 F.2d 234

---

[PAGE 2]

(6th Cir. 1992); *School District of the City of Allentown v.*

*Marshall*, 657 F.2d 16 (3d Cir. 1981).

It is undisputed that Complainant received written notice of his termination on November 6, 1991, to be effective on November 29, 1991, C-U, and that Complainant believed this adverse action was motivated by his dealings with the Nuclear Regulatory Commission (NRC). T-2 at 154. As a result, Complainant immediately contacted his attorney to pursue the matter. His attorney sent a letter to Respondent dated November 13, 1991, demanding reinstatement and alleging that the discharge was improperly motivated by the NRC report, and informing Respondent that he would pursue legal avenues to protect his clients rights. C-AA. He also sent a letter to the NRC on November 13, requesting a copy of the NRC's final report and indicating a suspicion that Complainant was being punished for telling the NRC the truth. C-Y. This evidence demonstrates that Complainant was aware of the adverse action against him on November 6, and believed at that time that the action was retaliatorily motivated in violation of the ERA.

The ERA filing period commences on the date that a complainant is notified of the challenged employment decision rather than at the time the effects of the decision are ultimately felt. *English* at 961-962; *Bonanno v. Northeast Nuclear Energy Co.*, Case Nos. 92-ERA-40, 41, Sec. Final Dec. and Order, Aug. 25, 1993, slip op. at 6-7; *Howard* at 2. In this case, the notice of termination was final and unequivocal when Complainant received the notice of discharge letter on November 6, 1991. See *English* at 961-962; *Ballentine v. Tennessee Valley Authority*, Case No. 91-ERA-23, Sec. Final Dec. and Order, Sept. 23, 1992, slip op. at 2; *Symmes v. Purdue University*, Case No. 87-TSC-5, Sec. Final Dec. and Order of Dismissal, March 10, 1992, slip op. at 2; *Jenkins v. City of Portland*, Case No. 88-WPC-4, Sec. Dec. and Order of Remand, May 22, 1991, slip op. at 5-7. The November 29 effective date, and any alleged subsequent conversations concerning the possibility of allowing resignation in lieu of termination or even an extension of the effective date of the termination, did not alter the triggering date of the filing period (the date Complainant was made aware of the challenged decision). See *English* at 961-962; *Ballentine* at 2.

The complaint in this case was filed on December 24, 1991, more than thirty days after the alleged violation occurred. [2]

Turning to the issue of equitable tolling, I reject Complainant's argument that either Respondent or the NRC actively misled him as to the appropriate filing deadline thereby requiring equitable tolling of the filing period. *English* at 963. Although Complainant's counsel may not have been aware of the specific time allowed for filing a complaint under the ERA,

---

[PAGE 3]

ignorance of the law alone is not sufficient to warrant equitable tolling of the limitations period. [3] See *Rose v. Dole*, 945 F.2d 1331, 1335 (6th Cir. 1991); *Gabbrielli v. Enertech*, Case No. 92-ERA-51, Sec. Final Dec. and Order, July 13, 1993, slip op. at 8-9. There is no evidence in this record that Respondent

deliberately misled Complainant as to the existence of his complaint or attempted to coerce Complainant into not filing a complaint. See *City of Allentown* at 19-21. Nor is there any evidence to support an alternate theory of equitable tolling in this case.

Accordingly, the complaint is dismissed.

SO ORDERED.

ROBERT B. REICH  
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] ALJ's Errata of June 7, 1993, corrected page 10 with respect to the misstatement in line 14, which now correctly reads "more recent determination has not been accepted . . ." Complainant's counsel argues in his Brief of May 24, 1993, that an additional factual correction is needed on page 10 concerning the date of the NRC response letter from Karla D. Smith to the Proskin Law Firm. Relying on the exhibit proffered by Complainant's counsel at the hearing, C-Z, the ALJ found this letter dated November 19, 1991 was received on November 21, 1991. Counsel for Complainant has now submitted before me a facsimile transmission of a letter from Karla D. Smith to the Proskin Law Firm dated December 11, 1991 and urges that the date in the ALJ's R.D. and O. should be corrected to December 11, 1991. No explanation is offered for counsel's failure to enter the December 11 letter into the record at the hearing, or for submission the November letter. I find that the ALJ used the correct date based on the evidence submitted before him. I note however, that neither of these factual disputes alters the outcome of this decision.

[2] Section 2902(b) of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, amended the time period for filing a complaint to 180 days for claims filed on or after the date of its enactment, October 24, 1992. See Section 1902(i) of Pub. L. No. 102-486.

[3] The argument by Complainant's counsel that the NRC is responsible for his failure to timely file this ERA complaint must be rejected. Counsel's letter to the NRC on November 13, 1991 did not request information on how, where and when to file an ERA complaint, but requested a copy of the NRC's final report on Respondent, which the record evidence indicates the NRC sent on November 19, 1991. C-7.